UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Hon. Joanna Seybert
	)	Hon. Michael Orenstein (MO)
- against -	)	Civil Action No. CV-97-6497 (JS)
	)	
CHANCELLOR MEDIA COMPANY, INC.	)	
and	)	
SFX BROADCASTING, INC.,	)	Filed: 3/31/98
	)	
Defendants.		

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The plaintiff filed a civil antitrust Complaint on November 6, 1997, alleging that Chancellor Media Corporation (successor in interest to Chancellor Media Company, Inc.)("Chancellor") proposed acquisition of four radio stations in Suffolk County, N.Y. owned by SFX Broadcasting, Inc. ("SFX") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18 and Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges, among other things, that Chancellor and SFX are the number one and number two radio companies on Long Island and that they each own radio stations in Suffolk County, N.Y. The Complaint also alleges that WALK-FM (Chancellor) and WBLI-FM/WBAB-FM (SFX) have been locked in a daily battle against each other for radio advertising revenues in Suffolk County, N.Y. The Complaint further

alleges that the proposed acquisition would substantially lessen competition in the sale of radio advertising time in Suffolk County, N.Y. Specifically, the Complaint alleges that the proposed acquisition would increase Chancellor's share of the radio advertising market in Suffolk County, N.Y. from 33 percent to over 65 percent, and would give to Chancellor the ability to raise prices to many advertisers, and to reduce promotional services to regional and local customers. Finally, the Complaint alleges that meaningful entry into the market is blockaded and entry would not undermine an anticompetitive price increase imposed by the Chancellor/SFX radio stations.

The prayer for relief seeks: (a) adjudication that Chancellor's proposed acquisition of WBLI-FM and WBAB-FM from SFX would violate Section 7 of the Clayton Act and Section 1 of the Sherman Act; (b) permanent injunctive relief preventing the consummation of the proposed acquisition; (c) a finding that the Local Marketing Agreement (LMA) between Chancellor and SFX regarding SFX's Suffolk County radio stations violates Section 1 of the Sherman Act and an Order terminating the LMA,[1]; (d) an award to the United States of the costs of this action; and (e) such other relief as is proper.

The United States has reached a proposed settlement with Chancellor and SFX which is memorialized in the proposed Final Judgment which has been filed with the Court. Under the terms of the proposed Final Judgment, defendants Chancellor and SFX will terminate the LMA as soon as possible, but no later than August 1, 1998. Chancellor will thus cease operating the four stations it sought to acquire from SFX in Suffolk County -- WBLI-FM, WBAB-FM, WGBB-AM, and WHFM-FM -- by August 1, 1998 and the market will return to its pre-LMA

[1]The LMA is an agreement between Chancellor and SFX which permits Chancellor to take operating control of the SFX stations before taking ownership. Under the LMA Chancellor is permitted to program the SFX stations and to sell advertising time on them.

structure.[2] Also under the terms of the agreement, Chancellor will not acquire the radio stations at issue. Finally, defendants have agreed that they and their successors will not convey the radio assets in any way that would allow the entity controlling WALK-FM to control either WBLI-FM or WBAB-FM or the entity controlling either WBLI-FM or WBAB-FM to control WALK-FM.[3]

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA and that they can fulfill their obligations under the Final Judgment. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. THE ALLEGED VIOLATION

A. The Defendants

Chancellor is a Delaware corporation headquartered in Irving, Texas. At the time this action was commenced in November 1997, it was the second largest owner of radio stations in the United States and owned 95 radio stations in 21 major U.S. markets, including in each of the 12 largest markets. Chancellor owns two radio stations in Suffolk County, WALK-FM and WALK-AM. Chancellor's revenues in 1996 from WALK-FM and WALK-AM was approximately $13.3 million. Virtually all of Chancellors revenues on Long Island were generated by WALK-FM.

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[2]Although Chancellor sought to acquire four radio stations from SFX -- WBLI-FM, WBAB-FM, WHFM-FM and WGBB-AM -- in the transaction at issue in this case, the competitive concern arose from the proposed acquisition of WBLI and WBAB.

[3]The proposed Final Judgment does not prevent Chancellor or another party from owning WHFM-FM and WGBB-FM as well as WALK-FM. As previously noted, the competitive concern of the proposed transaction arose from Chancellor's proposed acquisition of WBLI and WBAB.

SFX is a Delaware corporation headquartered in New York, N.Y. SFX owns or operates 85 radio stations located in 23 markets in the United States, including WBLI-FM, WBAB-FM, WHFM-FM, and WGBB-AM in Suffolk County, New York (hereinafter, "the SFX stations"). In 1996, SFX had revenues of approximately $11 million from its Suffolk County-based radio stations.

B. Description of the Events Giving Rise to the Alleged Violation

Prior to July 1, 1996, the Chancellor and SFX radio stations in Suffolk County were vigorous and direct competitors for advertisers seeking to reach potential customers in Suffolk County, New York. Competition among these stations was an essential element in keeping down radio advertising prices for Suffolk County advertisers. In fact, WALK's Director of Sales wrote that WALK was "[f]ighting WBLI['s] and WBAB['s] low 'firesale' rates." On or about July 1, 1996, Chancellor and SFX entered into an asset exchange agreement whereby SFX agreed to exchange its four Suffolk County-based radio stations -- WBLI-FM, WBAB-FM, WHFM-FM, and WGBB-AM-- for Chancellor's two Jacksonville, Florida radio stations and an additional $11 million. In addition, at approximately the same time, the defendants entered into an LMA where Chancellor took over control of programming and advertising sales at the SFX stations in Suffolk County, N.Y. The result of the LMA was to place in Chancellor's hands control over SFX's radio stations on Long Island. The proposed acquisition would have made that control over SFX's stations complete.

In evaluating the proposed acquisition, Chancellor wrote the "WALK, WBLI and WBAB combined own about 63% of a market with 36 million in net revenues." Chancellor's chief financial officer told the board of directors, the acquisition "will make Chancellor the dominant radio broadcaster" on Long Island. Chancellor's marketing executives wrote that the proposed acquisition "Will result in less competitive undercutting" and that "[r]ates will increase as a result of the removal

of competitive pressures." Chancellor's Director of Sales and Chancellor's General Sales Manager told the General Manager heading Chancellor's Long Island operations that the proposed accusation means "The War is Won."

C. Anticompetitive Consequences of the Proposed Merger

1. The Sale of Radio Advertising Time In Suffolk County, N.Y.

The Complaint alleges that the provision of advertising time on radio stations serving Suffolk County, N.Y. constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. It is important to note that radio stations by their music mix, attention to local community news and events, and promotions seek to attract listeners who they then sell advertisers access to by radio. Radio's unique characteristics as an inexpensive drive-time and workplace news and entertainment companion has given it a distinct and special place in our lives. Retailers, in an effort to reach potential customers have resorted to a mix of electronic and print media to deliver their advertising message. In so doing, they have learned that certain mediums are more cost-effective than others in meeting their advertising goals. Radio advertising is such a medium.

When radio advertisers use radio as part of a "media mix," they often view the other advertising media (such as television or newspapers) as a complement to, and not a substitute for, radio advertising. Many advertisers who use radio as part of a multi-media campaign do so because they believe that the radio component enhances the effectiveness of their overall advertising campaign. They view radio as giving them unique and cost-effective access to certain audiences. They recognize that since radio is portable people can listen to it anywhere especially in places and situations where other media are not present, such as in the office and car. In addition, they know that radio formats are designed to target listeners in specific demographic groups. Defendants'

documents clearly confirm these facts. Their documents show that radio stations see other radio stations as their principal competition. For example, one such document acknowledged that "pressure from other [radio] stations keep [sic] us from selling new business at the rates we want to get." Another high level management strategic document unearthed in the files of WBLI and WBAB echoed the same sentiments by noting that "WALK and WBZO are the primary barriers to increasing rate[s]." The quality and magnitude of evidence such as this showing that radio stations constrain the price of other radio stations in their efforts to charge higher prices to advertising customers is powerful evidence supporting the allegation in the Complaint that the sale of radio advertising time constitutes a line of commerce for antitrust purposes.

2. <u>Harm to Competition</u>

The Complaint alleges that Chancellor's acquisition of SFX's Long Island stations would join under single ownership the principal stations serving Suffolk County, New York and give to Chancellor the ability to raise radio advertising prices to its customers. Local and national advertising placed on radio stations within Suffolk County, N.Y. are aimed at reaching listening audiences in Suffolk County, and radio stations located outside of Suffolk County do not provide cost-effective access to this audience. Thus, if Chancellor were to imposed a small but significant non-transitory increases in radio advertising prices on the radio stations it owns or controls in Suffolk County, radio stations located outside of Suffolk County would not be able to defeat it. In fact, defendants in marketing their radio stations to Suffolk County radio advertisers emphasized the fact that New York City radio stations do not provide cost-effective access to Suffolk County customers. Defendants characterized New York City radio stations' ability to reach the tri-state metropolitan area as "waste" to those Suffolk County advertisers not seeking to attract customers from New York

City, New Jersey or Connecticut to their local Suffolk County establishments.

Defendants' documents further disclosed that when Chancellor's and SFX's radio stations on Long Island operated independently, advertisers obtained lower prices by "playing off" Chancellor's WALK-FM against SFX's WBLI-FM and WBAB-FM. Advertisers used the threat to move their business between the Chancellor and the SFX stations to get more favorable prices and services at each. That documentary evidence is corroborated by the testimony of local and regional advertisers who testified how they feared the joining of WALK with WBLI and WBAB would mean that Chancellor could raise prices to them. In short, advertisers in Suffolk County paid less for radio advertising as a result of price competition between the Chancellor and SFX radio stations. The proposed acquisition would have ended that price competition harming customers on Long Island.

a. Advertisers could not turn to other Suffolk County radio stations to prevent Chancellor from imposing an anticompetitive price increase

Barnstable is the only company other than Chancellor and SFX that generates more than five percent of the total radio revenues spent by advertisers on Long Island-based radio stations that offer coverage of Suffolk County ("Suffolk County stations"). Barnstable owns WBZO-FM, the only other Suffolk County station that generates ratings and advertising revenues comparable to the Chancellor and SFX stations. Barnstable is not able to offer, individually or in combination with any non-Chancellor owned or operated stations, enough listeners in the Chancellor/SFX-dominated market to provide a non-Chancellor alternative for many advertisers who want access to Suffolk County radio listeners. Moreover, if Chancellor were to impose a non-competitive price increase on its Chancellor/SFX radio stations, Barnstable would not be able to present itself as a credible alternative to those advertisers seeking to escape the price increase on the Chancellor/SFX radio

stations. That is so, because an increase in demand for WBZO as a result of radio advertisers trying to flee a price increase on the Chancellor/SFX stations could undermine the attractiveness of WBZO to listeners who would have to contend with a larger number of advertising commercials and less music and news on WBZO. Recognizing that fact, WBZO would likely increase its price to dampen the demand on its station in order to maintain its attractiveness to listeners. Thus, a price increase on the Chancellor/SFX stations would likely provide an opportunity for Barnstable to increase its prices as well.

To the degree there are a number of other radio broadcasters on Long Island, individually or in combination they are less able than Barnstable to offer an alternative for those advertisers -- especially local and regional advertisers -- who would have to deal with Chancellor to gain access to Suffolk County radio listeners after the proposed acquisition.

b. The effect of the acquisition would be substantially to lessen competition in the relevant market

As previously noted, Defendants' documents tell a compelling story of how the proposed acquisition would enable Chancellor to increase rates by stifling the "competitive undercutting" that went on among the Chancellor/SFX stations. The dominant market share Chancellor would have attained from the proposed acquisition would have the following effects, among others:

a. competition in the sale of radio advertising time for coverage of Suffolk County would be substantially lessened;

b. actual and potential competition between Chancellor and SFX radio stations in the sale of advertising time -- especially to regional and local advertisers would be eliminated;

c. Chancellor's share of the relevant market would have increase from 33 percent to over 65 percent, whether measured by radio advertising revenues or by listenership. Using a measure of market concentration called the

Herfindahl-Hirschman Index ("HHI"), explained in Appendix A, the acquisition would yield a post-merger HHI of at least 4975, representing an increase of 2085; and

d. prices for radio advertising for coverage of Suffolk County would likely increase, and the quality of promotional services would likely decline -- especially to regional and local customers.

The proposed Final Judgment will remedy the competitive concerns raised by the proposed acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in Suffolk County, N.Y. It requires Chancellor and SFX to terminate their LMA as soon as possible, but no later than August 1, 1998. In addition, the proposed Final Judgment provides that neither defendant, nor their successors, can own or control at the same time WALK-FM and either WBLI-FM or WBAB-FM. This relief will terminate the LMA and return the market pre-LMA structure. If Chancellor had acquired the stations, it would have controlled about 65% of the Suffolk County radio market. Under the proposed Final Judgment, Chancellor will return to it pre-LMA market shares of approximately 35% while another party or parties will control the approximately 30% of the market that WBLI-FM and WBAB-FM posses. The proposed Final Judgment will preserve choices for advertisers. In addition, the proposed Final Judgment will help insure that WALK's, WBLI's and WBAB's radio advertising rates will be subject to the "playing off" by advertisers that they were subject to prior to the LMA.

In addition to requiring the defendants to terminate the LMA and prohibiting them from consummating the transaction, the proposed Final Judgment requires Chancellor to preserve the assets of the SFX stations until termination of the LMA. Specifically, the proposed Final Judgment

requires that Chancellor maintain the station as viable entities, including the obligation that Chancellor work to increase the sale of advertising and maintain promotional and marketing levels for the SFX stations. The proposed Final Judgment also contains provisions to ensure that Chancellor will not divert resources from the SFX stations to its own radio stations during the course of the LMA. To determine and secure compliance with the proposed Final Judgment, the United States has the authority to monitor and review the activities of the stations. Nothing in this proposed Final Judgment is intended to limit the plaintiff's ability to investigate or bring actions, where appropriate, challenging other past or future activities of defendants in Suffolk County or any other markets, including their entry into an LMA or any other agreements related to the sale of advertising time.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has not prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United

States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Any such written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its complaint against defendants. The plaintiff is satisfied, however, that the termination abandonment of the proposed and other relief contained in the proposed Final Judgment will

preserve viable competition in the sale of radio advertising time in the Suffolk County, N.Y. area. Thus, the proposed Final Judgment would achieve the relief the Government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any' other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[4] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of

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[4] 119 Cong. Rec 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

antitrust enforcement by consent decree.[5]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[6]

In this case, the proposed Final Judgment reflects the Defendants desire to abandon the proposed acquisition and end the LMA. Moreover, it insures that the present and any future owner of WALK-FM may not own either WBLI-FM or WBAB-FM. In sum, the Final Judgment represents every objective the government sought through bringing its action.

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[5] Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added); see BNS, 858 F.2d at 463; United States v. National Broad. Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. At 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'") (citations omitted).

[6] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

_____/s/_____

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Dated: March 30, 1998

APPENDIX A
HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines § 1.51*.

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of March 1998, I caused to be served via hand delivery a copy of the foregoing Competitive Impact Statement upon the following:

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_____/s/_____
Seth E. Bloom